IN THE

Supreme Court of the United States

October Term, 1967
No. 244

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OLGA NATOLI, *Petitioner*

v.

MARGARET K. HAMILTON,
WILBUR H. HAMILTON, JR.
CONTINENTAL BANK & TRUST CO.,
SUCCESSOR TO BROAD STREET TRUST CO.
and
THE ESTATE OF WILBUR H. HAMILTON, DECEASED,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The Opinion of the Court of Common Pleas of Philadelphia County is unreported. A true and correct copy of such Opinion appears as Appendix A hereof.

The Opinion of the Supreme Court of Pennsylvania is reported at 424 Pa. 643. The Opinion of the Supreme Court of Pennsylvania respecting Petitioner's Petition For Reconsideration or to Vacate Order is unreported. A true and correct copy of the aforesaid Opinions appear as Appendix B hereof.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Is it repugnant to the provisions of either the Pennsylvania Constitution or the Constitution of the United States for a court of concurrent jurisdiction to defer, as a matter of comity, to the Orphans' Court of Philadelphia, which latter court first obtained jurisdiction over a creditor's claim against a decedent's estate?

STATEMENT

Petitioner, on June 1, 1966 instituted an action in Assumpsit against Respondent in the Common Pleas Court of Philadelphia County to recover from the Estate of Wilbur H. Hamilton the amount of an alleged loan made to the decedent by Petitioner during the lifetime of the decedent.

On February 28, 1966, *three months prior to the institution of the aforesaid action*, counsel for Petitioner presented the identical claim to the Respondents pursuant to the Fiduciaries Act of 1949, 20 P.S. §320.614, which provides:

> "(a) Written notice. Written notice of any claim against a decedent given to the personal representative or his attorney of record before the claim is barred shall toll the statute of limitations.
>
> (b) Acts equivalent to written notice. Any of the following acts by a claimant shall be equivalent to the giving of written notice of a claim to the personal representative:
>
> (1) Instituting proceedings to compel the filing of an account;

(2) Bringing an action against the personal representative in any court having jurisdiction of the claim and having the writ or pleading duly served on the personal representative;

(3) Substituting the personal representative as a defendant in an action pending against the decedent;

(4) Receiving a written acknowledgment by the personal representative or his attorney of record of the existence of the claim."

The account of the Executors was filed on April 19, 1966 and written notice of the filing of the account and of the date of the scheduled audit was sent to Petitioner pursuant to the requirements of the Fiduciaries Act of 1949, 20 P.S. §320.703, which provides:

"The personal representative shall give written notice of the filing of his account and of its call for audit or confirmation to every unpaid claimant who has given written notice of his claim to the personal representative or his attorney of record, and to every other person known to the accountant to have an interest in the estate as beneficiary, heir, or next of kin."

Petitioner's claim, though contested, was nevertheless submitted for adjudication to the Orphans' Court in such account.

Counsel for Petitioner appeared at the audit on the scheduled date and objected to such audit, which was, therefore, continued.

Respondents filed timely Preliminary Objections to Petitioner's Complaint in Assumpsit, which, after argument, were sustained by the Court of Common Pleas of Philadelphia County. (See: Appendix A).

Upon appeal the Supreme Court of Pennsylvania affirmed the order of the Court of Common Pleas in a Per Curiam opinion. (See: Appendix B).

Thereafter, Petitioner filed a Petition for Reconsideration or to Vacate Order (See: Appendix A of the Petition) and Respondents filed an Answer to such Petition, a true and correct copy of which appears as Appendix C hereof.

On May 25, 1967, in a Per Curiam opinion, the Supreme Court of Pennsylvania denied the aforesaid Petition. (See: Appendix B).

ARGUMENT

I. *The Decision of the Court Below Was Clearly Correct and Does Not Conflict With Any Prior, Contemporaneous, or Subsequent Decision of Such Court.*

The jurisdiction of probate courts in the Commonwealth of Pennsylvania is statutory. The Orphans' Court Act of 1951, 20 P.S. §2080.301 provides, inter alia, as follows:

> "The Orphans' Court shall have exclusive jurisdiction over: (1) the administration and disposition of the real and personal property of decedents' estates."

It is a well settled principle of law in Pennsylvania that the administration of the estate of a decedent is one indivisible judicial proceeding, from the grant of letters appointing the administrator until his discharge. *Webb Estate*, 391 Pa. 584, 590 (1958).

The scope of the Orphans' Court jurisdiction includes the power to determine all questions essential to the matters properly before it and it is exceptionally well qualified to determine claims of creditors. *Snyder's Estate*, 368 Pa. 393, 398 (1951); *Long's Estate*, 254 Pa. 370 (1916).

In *Long's Estate*, supra, the Court stated:

> "It is now the settled law, that the Orphans' Court has *exclusive* jurisdiction over all matters pertaining

to the settlement and distribution of estates, *including the claims of creditors*, next of kin and legatees. *Linsenbigler v. Gourley*, 56 Pa. 166, 172; *Dundas' Appeal*, 73 Pa. 474; *Mauser v. Kerper*, 102 Pa. 444; *Kings' Estate*, 215 Pa. 59." 254 Pa. at 374. (Emphasis supplied.)

As indicated in the opinion filed by the Court of Common Pleas, the Orphans' Court obtained jurisdiction over the claim which formed the basis for Petitioner's assumpsit action at least five and one-half weeks prior to the institution of the latter action in the Court of Common Pleas. (See: Appendix A, infra, p. 17.) *Sheehan's Estate*, 78 D. & C. 385 (1952).

Once such an account is filed with the Orphans' Court the jurisdiction and powers of that Court, both legal and equitable, become paramount to those of all other courts. Partridge & Remick, Pennsylvania Orphans' Court Practice, Vol. 6, §44.01(e), p. 10.

To permit a court of concurrent jurisdiction to undertake the determination of a creditor's claim against an estate, after jurisdiction has attached in the Orphans' Court and the claim has been submitted for adjudication would permit the parties to ride "the processes of the two courts like a circus equestrian astride two spirited horses at the same time." *Sheehan's Estate*, supra, at 387.

To permit such a situation to exist would be contrary to the principle of harmonious cooperation in our several courts, particularly in light of the fact that the litigants must ultimately abide the Orphans' Court's determination with respect to distribution of the assets of the estate. Orphans' Court Act of 1951, 20 P.S. §2080.301.

Moreover, even if a right to trial by jury on an issue of simple debt between *man and estate* is constitutionally protected, the order of the lower court in the instant case, dismissing Petitioner's Common Pleas Court action, did not foreclose such right, since Petitioner has the right to

demand a jury trial in the Orphans' Court. Act of July 14, 1961, 20 P.S. §2080.745.

Respondents suggest that, since Petitioner has never demanded such right in the Orphans' Court and that latter Court has never had the opportunity to pass upon Petitioner's request, the issue of denial of right to jury has not yet come into fruition and the present Petition is premature.

All that was decided in the Court below was that when a Court of competent jurisdiction acquires jurisdiction of the subject matter its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of, and no court of coordinate jurisdiction is at liberty to interfere with its action. *Cleveland P. & A. R. Co. v. Erie*, 27 Pa. 380, 382-383 (1856); *Sprigg v. Commonwealth Title Ins. Co.*, 206 Pa. 548, 554 (1903); *Landis v. Landis*, 343 Pa. 252, 254 (1942); *Frews' Estate*, 340 Pa. 89, 91-92 (1940); *Criswell's Estate*, 334 Pa. 266, 271 (1939).

This doctrine of comity is particularly applicable where *only* the court first obtaining jurisdiction can administer full relief. *Wormley's Estate*, 67 D. & C. 616 (1949); *Princess Lida v. Thompson*, 305 U.S. 456 (1938).

Petitioner cannot draw any meaningful or relevant distinction between the instant case and *Princess Lida*, supra.

In the latter case this Honorable Court affirmed the decision of the Supreme Court of Pennsylvania in *Thompson v. Fitzgerald*, 329 Pa. 497 (1938) which held that where a court of coordinate jurisdiction has first undertaken the administration of the assets of an estate or other entity, that court is entitled to retain such jurisdiction to the end, without interference or hindrance on the part of any other court and such other courts of coordinate jurisdiction are disabled from exercising a like power.

Nothing which is stated in the cases cited in the Petition (i.e., *Holtz Will*, 422 Pa. 540 (1966); *Probst v. First*

National Bank of Williamsport, 73 D. & C. 317 (1950); *Malvestuto Estate*, 25 D. & C. 2d 686 (1962) required the Court below to come to any decision different from the one they reached or contrary to the holding of this Honorable Court in *Princess Lida*, supra.

In speaking of the comity doctrine and its importance the Court in the *Thompson* case, supra, stated:

> "This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subject and persons. The doctrine in question is not limited in its application to cases where property has actually been seized under judicial process before a second suit is instituted in another court, but it applies as well where suits are brought to enforce liens against specific property, to marshal assets, *administer trusts* (italics supplied by court) or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property. In cases of the latter kind, the rule is that the tribunal which first acquires jurisdiction of the cause by the issuance and service of the process is entitled to retain it to the end, without interference or hindrance on the part of any other court."

The views expressed by the Pennsylvania Court were reinforced by this Honorable Court in *Princess Lida*, supra, in which Mr. Justice Roberts stated:

> "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought

to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals." 305 U.S. at 466. See also: *Palmer v. Texas*, 212 U.S. 118 (1908); *United States v. Bank of New York & T. Co.*, 296 U.S. 463 (1935).

The application of the comity principle in probate matters is not of recent vintage. It has long been held that where a matter has been committed to the Orphans' Court, a court of concurrent jurisdiction will not entertain an action on the same issue. *Mauser v. Mauser*, 326 Pa. 257 (1937); *Landis v. Landis*, 343 Pa. 252 (1942); *Graham Estate*, 147 Pa. Super. 57, *aff'd* 346 Pa. 479 (1943).

In *Binenstock Trust*, 410 Pa. 425 (1963) the Supreme Court of Pennsylvania gave recent expression to the need for the doctrine of comity and considered the deference which one court of concurrent jurisdiction must give to another where the latter has first acquired jurisdiction. The Court stated:

> "It is well established that orderly judicial procedure dictates that the court which first acquires jurisdiction over a matter be permitted to decide all questions relating thereto. See *Thompson v. Fitzgerald*, 329 Pa. 497; 198 Atl. 58, (1938); *Wilson v. Board of Directors of City Trusts*, 324 Pa. 545; 188 Atl. 588 (1936). Our problem, therefore, becomes one of determining which court first acquired jurisdiction over the inter vivos trust." 410 Pa. at 430-431.

It is clear that the jurisdiction exercised over the assets of an estate by the Orphans' Court is an *in rem* jurisdiction. *Princess Lida v. Thompson*, supra; *Thompson v. Fitzgerald*, supra; Orphans' Court Act of 1951, 20 P.S. §2080.301.

Since the decision of this Honorable Court in *Princess Lida*, supra, the rule there enunciated has been justifiably relied upon by federal as well as state tribunals. See: *Gately v. Gately*, 316 F. 2d 585 (7th Cir. 1963); *Safeway Trails, Inc. v. Stuyvesant Insurance Co.*, 211 F. Supp. 227, 237 (M.D. No. Car. 1962); *Donovan v. Dallas*, 377 U.S. 408, 412 (1964).

Thus, it has been consistently held that sound judicial practice requires that the court first obtaining jurisdiction over the subject matter of an action, especially when such jurisdiction is *in rem* and the parties can obtain final satisfaction *only* in such court, should retain such jurisdiction without interference or hindrance on the part of any other court.

The determination of the court below, premised upon the foregoing principle of "sound judicial practice", was clearly correct and consistent with all prior, contemporaneous, and subsequent decisions of such court and this Honorable Court.

For this reason alone the Petition is completely devoid of merit and should not be granted.

II. *Petitioner Is Not Entitled to a Jury Trial as a Matter of Constitutional Right, but in Any Event Such Right, If It Exists, Has Not Been Violated.*

The question presented by Petitioner in her second argument is simply: Does a constitutional right to trial by jury exist as to a claim made on a simple debt by a creditor *against the estate of a decedent?*

Due process does not require a jury trial in all classes of actions. Article I, Section 6 of the Pennsylvania Constitution of 1874 preserves only the right to trial by jury in those cases where it existed at the time the Constitution was adopted. *Pa. P. U. C. v. W. J. Dillner Transfer Co.*, 191 Pa. Super. 136 (1960); *Fleming's Estate*, 265 Pa. 399, 407, 408 (1919); *Teacher v. Kijurina*, 365 Pa. 480 (1950); *Allen v. Biggs*, 62 F. Supp. 229 (E.D. Pa. 1945).

The dismissal of a complaint on proper grounds is not tantamount to a denial of a trial by jury. In *Allen v. Biggs*, supra, Judge Ganey said at page 230:

> "There is now no doubt whatever that a trial court's dismissal of a complaint, which is not well founded, . . . is not violative of the Seventh Amendment. As is stated in 31 American Jurisprudence, 561: 'The right (to jury trial) does not exist with respect to a complaint or declaration as to which a dismissal or non-suit is proper or with respect to facts as to which there is no traverse and as to which the defendant has defaulted. . . .' The right to trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."

So also as to Article I, Section 6 of the Pennsylvania Constitution; it was not intended to extend the right of trial by jury, but merely to preserve the right as it existed at the time of the foundation of our state government. *Pennsylvania Publications v. Pa. P.U.C.*, 152 Pa. Super. 279 (1943); *Comm. v. Wesley*, 171 Pa. Super. 566 (1952).

Petitioner cannot claim any greater right under the Seventh Amendment to the Federal Constitution, which simply makes the same preservation, and moreover has no application to actions brought in state courts. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916).

In the *Bombolis* case, supra, this Honorable Court stated:

> "The one question to be decided is therefore reduced to this: Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict?
>
> "Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is

that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. ed. 213, 223; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Brown v. New Jersey*, 175 U.S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Twining v. New Jersey*, 211 U.S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 469, 552, 8 L. ed. 751, 781; *Supreme Justice v. Murray (Supreme Justice v. United States)* 9 Wall. 274, 19 L. ed. 658; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Walker v. Sauvinet*, 92 U.S. 90, 23 L. ed. 678; *Pearson v. Yewdall*, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning." 60 L. ed. p. 963 241 U.S. at 217.

While Petitioner cavalierly contends for a federally guaranteed right to jury trial in a state court proceeding, she cites no authority for the proposition and has completely overlooked the wealth of authority which is directly contrary to her position. See, e.g., 5 Moore, Federal Practice, pg. 77; Dennis, Jury Trial and the Federal Constitution (1906); *Gustafson v. Peck*, 216 F. Supp. 370 (N.D. Iowa 1963); *Fay v. New York*, 332 U.S. 261, 288 (1947); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *U.S. ex rel. Tillery v. Cavell*, 294 F. 2d 12 (3rd Cir. 1961), cert. denied 370 U.S. 945 (1962).

Petitioner's completely unsupportable reliance upon the provisions of the Constitution of Pennsylvania hold her in no better stead.

Section 11 of the Declaration of Rights contained in the first Pennsylvania Constitution of 1776 gave the right to a jury trial only in "controversies respecting property, and in suits *between man and man.*" This provision refers to civil actions only. *Commonwealth v. Kramer*, 146 Pa. Super. 91 (1941).

Section 25 of the 1776 Constitution provided that jury trials were to be "as heretofore" and applies generally to criminal and civil cases. *Commonwealth v. Kramer*, supra.

The Constitution of 1790 states only that the right to trial by jury will be as heretofore. Prior to 1790 the right was applicable to criminal cases and civil actions respecting property or suits *between man and man.*

Thus, at the time the 1874 Constitution was adopted the only right to trial by jury was in criminal cases and civil actions involving controversies respecting property or claims *between man and man.*

By quoting at length from the annotations in Purdon's Statutes, Petitioner comes to the conclusion that even prior to 1776 there was a right to trial by jury in actions of debt. Petitioner has actually cited no authority for the aforesaid legal conclusion. Even if it was agreed that such right did exist as relates to controversies between

man and man, that is not the issue under consideration. Petitioner has cited no case which holds that prior to 1776 *a creditor of a decedent's estate* had a right to have his claim of debt presented to a jury.

All of the cases cited by Petitioner are distinguished from the instant case; are not responsive to the question here involved; and are inapposite.

The cases of *Orban v. Rothrock*, 19 D. & C. 2d 336 (1959), and *Probst v. First National Bank of Williamsport*, 73 D. & C. 317 (1950), do not treat at all of the question here involved. In neither case does the court concern itself with the issue of the right to trial by jury in a claim against a decedent's estate. Both cases address themselves only to the question of concurrent jurisdiction.

Nowhere in *Probst*, supra, does the court consider the issue here involved, and, to the extent that it relied upon the existence of a right to trial by jury as a basis for its holding that a common pleas court had concurrent jurisdiction of a claim against a decedent's estate, it was in error.

Although Respondents disagree with the holding of the case even as respects the question of concurrent jurisdiction, it is submitted that the court in *Probst* considered only the latter issue and any reference to the right to trial by jury was merely poorly chosen and unsupported dicta.

In the case of *Low v. Ahlquist*, 28 Lehigh County Law Journal 455, *an estate was bringing the action as opposed to a creditor suing an estate.* Giving the decision even the broadest effect, it is not responsive to the issue here involved and is completely inapposite.

Nor did *Lackawanna Ice Co. v. Weingartner*, 328 Pa. 362 (1938), cited by the court in *Low*, deal with a claim *against a decedent's estate.* The question of title to real property was there involved, a question always determined by a jury at common law.

In *Rybak Appeal*, 424 Pa. 470 (1967) the Supreme Court of Pennsylvania merely restated a familiar prin-

ciple of law so often enunciated by it and other state courts in the past: to wit, *when an estate makes a claim against a third party* jurisdiction lies only in the common pleas courts because such third party is not initially within the orbit of the Orphans' Court's power *unless he submits himself thereto. McGovern's Estate*, 322 Pa. 379 (1936); *Brown's Estate*, 343 Pa. 230 (1941); *Moreland Estate*, 351 Pa. 623 (1945).

Such decision did not comment upon, rule upon, or even hint that in suits *by claimants against an estate* the Orphans' Court should be ousted of jurisdiction which it first obtained.

Moreover, since Petitioner's reliance on her claim that her constitutional right to trial by jury has been infringed is dependent, under the cases, upon her showing that she was entitled to such right at common law, it is significant that she has cited no cases which indicate that she would have had a right to trial by jury at common law in an action for the recovery of a simple debt from a decedent's estate. Our own research discloses that in the absence of statutory authority therefor, there is no right to a jury trial in a probate court. Probate courts have always proceeded without the intervention of a jury and are not within the application of the constitutional provisions relating to the right to a trial by jury: 50 C.J.S. Section 13, p. 727, Section 55, p. 763.

It appears that the power to administer a decedent's estate in England, was divided between the ecclesiastical courts and the secular courts with the church courts administering the personalty of the deceased, while the secular courts administered the real estate: 3 American Journal of Legal History, 125 et seq. After the Reformation, parliament abolished the church courts and transferred the jurisdiction of estates to courts of chancery.

Following the passage of the Act of April 22, 1856, the Orphans' Court had control over realty and personalty. The net effect of this Act was that the probate of a will devising real estate could not be collaterally attacked in

a common law action of ejectment or trespass: *Wilson v. Gaston*, 92 Pa. 207 (1879). And although prior to 1919 it was believed that there was a right to trial by jury on the issue of a validity of a writing purporting to be a will, the court in *Fleming's Estate*, 265 Pa. 399 (1919) held that such right did not exist. Under the Orphans' Court Act of 1951, the empaneling of a jury on such issue is discretionary only: 20 P.S. 2080.745.

In *Marchiafava Estate*, 32 D. & C. 2d 5 (1964), a guardian argued that he was entitled to a jury trial as a matter of right as against a claim of the Commonwealth for monies it expended for the dependent child's assistance. After the matter was heard by the Orphans' Court en banc, in an opinion by President Judge Klein, he said:

> "We are of one mind that this contention is completely devoid of merit. Although counsel for the guardian cavalierly states that his client would have been entitled to a trial by jury to pass on the merits of the Commonwealth's claim, he furnishes no reliable support for his contention. He would have us destroy a judicial system which has been functioning effectively and satisfactorily for countless years. . . . It is, therefore, clear that the Orphans' Court has complete authority to dispose of all issues of fact arising in the course of any proceeding properly before it, with or without the assistance of a jury and issues need no longer be sent to the law courts for determination."

It is respectfully submitted that there is no authority indicating that on claims for simple debt against a decedent's estate in common law courts, a claimant was entitled to a jury trial. On the contrary, it would appear that such courts as passed on claims for debts of decedents passed judgment thereon without the benefit of a jury: *Sharp's Appeal*, 3 Grant 259; *In Re: Beehler's Estate*, 3 Phila. 254.

In summary, Petitioner has failed to cite a single authority for the proposition for which she contends and

the cases herein cited al lead inexorably to the conclusion that no right to jury tri l existed either at common law or exist under the Pennsyl ania Constitution or the Federal Constitution in actions b claimants against a decedent's estate.

Moreover, there is conflict in the decisions of the Supreme Court of Penns lvania on the question here presented, which decisions re consistent with those of this Honorable Court.

Finally, the question aised by Petitioner is not a substantial federal question nd is premature in any event since Petitioner has not, ven as of this date, demanded a jury trial in the Orphan Court and that latter court has not had an opportunity t pass upon any such request.

CONCLUSION

For the foregoing r asons, it is respectfully submitted that the petition for a rit of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

OPINION IN ACCORDANCE WITH RULE 63 OF THE PENNSYLVANIA SUPREME COURT

CHUDOFF, *J.* September 23, 1966

On June 1, 1966, the plaintiff, Olga Natoli, instituted an action in assumpsit in the Court of Common Pleas of Philadelphia County against the Executors of the Estate of Wilbur H. Hamilton, deceased. On June 10, 1966, defendants filed Preliminary Objections, questioning the jurisdiction of the Common Pleas Court over the subject matter. Argument was heard by the court on July 26, 1966, and dismissed the following day.

Wilbur H. Hamilton died on July 22, 1964, and on August 13, 1964, letters testamentary were granted to his executors. Plaintiff alleges that prior to decedent's death she had made two loans to him, one in the amount of $10,000.00 and another in the amount of $15,000.00, both of which remained unpaid at his death. On February 28, 1966, plaintiff, through her attorney, presented her claim to the executors of decedent's estate. The claim was denied by the executors but was submitted to the Orphans' Court for adjudication when the account was filed on April 19, 1966.

On May 23, 1966, plaintiff was notified that the account would be called for audit on June 6, 1966, before the Honorable Kendall H. Shoyer. On that date counsel for plaintiff appeared before the Orphans' Court to inform Judge Shoyer that a suit in assumpsit had been instituted in the Common Pleas Court of Philadelphia County on June 1, 1966, to recover the alleged debt. The audit was continued to allow the Court of Common Pleas to determine the question of jurisdiction.

In essence, defendant contended that the Orphans' Court Act of 1951 gave exclusive jurisdiction over the claims of creditors against an estate to the Orphans' Court and that even if there were concurrent jurisdiction with the Court of Common Pleas, comity would require us to defer to the Orphans' Court.

Plaintiff asserted that there was concurrent jurisdiction between the two courts and that she had an absolute right to either select her forum or to proceed in both.

The Orphans' Court has exclusive jurisdiction over all things pertaining to the settlement and distribution of estates: *Long's Estate*, 254 Pa. 370 (1961); but the Orphans' Court does not possess exclusive jurisdiction in the proof of claims of decedent's creditors. *Commonwealth to use v. Easton Trust Co.*, 347 Pa. 162 (1943). While these points appear superficially inconsistent, a close analysis leads to a logical conclusion. Apparently, either the Orphans' Court or the Common Pleas Court may consider the validity of a debt, but only the Orphans' Court may determine how a debt is to be included in the distribution of any estate.

Notwithstanding the existence of concurrent jurisdiction over the subject matter, sound judicial practice would preclude the possiblity of proceeding on the same claim in two courts. In the words of the Honorable Charles Klein, it would be as parties, "riding the processes of the two courts like a circus equestrian astride two spirited horses at the same time." In *Sheehan's Estate*, 78 D. & C. 385 (1952).

The rule of comity would dictate that the court which first entertained the proceeding ought to retain control of the matter until its conclusion. Thus, the problem resolved into determining which court first acquired jurisdiction. Obviously, the Common Pleas Court entered the picture on June 1, 1966, the date on which plaintiff filed her complaint.

At what point the issue came before the Orphans' Court is more difficult to discern. In Sheehan's Estate,

supra, President Judge Klein stated that the Orphans' Court acquired jurisdiction when the administrator's account was first called for audit. However, Judge Klein's remarks were not stated as a general principle but were carefully limited to that particular case. Nonetheless, his words did suggest that the Orphans' Court would obtain control no later than the date on which audit was called. Pennsylvania Orphans' Court Practice, an accepted authority, states that once an account has been filed in the Orphans' Court the jurisdiction and the powers of that court, both legal and equitable, become paramount to those of other courts. *Pennsylvania Orphans' Court Practice*, Partridge-Remick, Vol. 6, §44.01(e).

This view was persuasive with the court because the filing of an account most readily compares to the filing of a complaint. It is at this point in both procedures that the controversy first comes under the control of a court. Therefore, we concluded that the Orphans' Court first acquired jurisdiction on April 19, 1966, the day on which the account was filed, approximately five and one-half weeks before plaintiff instituted suit in Common Pleas Court. Following the rule of comity we deferred to the Orphans' Court.

Moreover, we did not believe that plaintiff's argument that she would be denied her right to a jury trial in Orphans' Court was timely made. The Orphans' Court has the power to grant a jury trial in proper instances and should plaintiff be denied a jury she may raise this issue at that time. Meanwhile, she will have the benefit of a court which the Pennsylvania Supreme Court said, ". . . is by custom and experience exceptionally well qualified to determine the claims of creditors . . ." *Snyder's Estate*, 368 Pa. 393 (1951).

For the foregoing reasons the court allowed defendants' preliminary objections.

By THE COURT:

/s/ CHUDOFF, *J.*

APPENDIX "B"

OPINION PER CURIAM, MARCH 14, 1967
ORDER AFFIRMED

OPINION PER CURIAM, MAY 25, 1967
PETITION DENIED

APPENDIX "C"

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

APPELLEES' ANSWER TO APPELLANT'S PETITION FOR RECONSIDERATION OR TO VACATE ORDER

To the Honorable the Chief Justice and Justices of the Supreme Court:

1. Denied as stated. Appellant appealed from a determination of the Court of Common Pleas of Philadelphia County sustaining Defendants' Preliminary Objections to her Complaint in Assumpsit on the ground that the Orphans' Court had first acquired jurisdiction over the subject matter of the dispute and that the rule of comity required that the matter remain in the Orphans' Court. The Court of Common Pleas also held that Appellant had not been denied her right to trial by jury if one in fact existed since she had not requested such right from the Orphans' Court.

2. Admitted.

3. Denied as stated. The opinion of this honorable court being in writing speaks for itself.

4. The opinion of this honorable court being in writing speaks for itself.

5. The opinion of this honorable court being in writing speaks for itself.

6. Denied. The court in the Estate of Eva Rybak reaffirmed the principle that a claim *by* an estate *against* a third party must be commenced in the Court of Common Pleas whereas in Natoli v. Hamilton this court held that a

claim by a third party against an estate should be commenced in the Orphans' Court and that once jurisdiction attached in the Orphans' Court, the principle of comity operated to preclude subsequent litigation in any other court. Appellant again ignores the Rules of the Supreme Court of Pennsylvania. Rule 71 of the Supreme Court requires that a Petition for Reargument must be filed within ten days after the final order, judgment or decree of the Supreme Court. The final judgment of the Supreme Court in Natoli v. Hamilton was March 14, 1967, the same date on which this honorable court decided the Estate of Eva Rybak, and it is manifest that Appellant's request for reargument has not been timely made.

Appellant has again raised the question of the right to jury trial. This question was raised in the Court of Common Pleas, and in Appellant's brief and argument before the Supreme Court of Pennsylvania. It is submitted that this issue has already been carefully considered by the lower court and the Supreme Court and decided adversely to Appellant.

7. Denied as stated. The opinion of the Superior Court being in writing speaks for itself and the issues there considered were and are irrelevant and immaterial to the issue presented to this court in Natoli v. Hamilton.

WHEREFORE, Appellees, by their attorney, Francis W. Sullivan, respectfully request this Court to dismiss Appellant's Petition.

Respectfully submitted,

FRANCIS W. SULLIVAN,
Attorney for Appellees.